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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

In Re PARR MEADOWS RACING
ASSOCIATION, INC.,

Petitioner in Bankruptcy,
SUFFOLK COUNTY TREASURER,
Petitioner,

v.

JAMES BARR, as Trustee of PARR MEADOWS RACING
ASSOCIATION, INC. and HARVEY L. GOLDSTEIN,
as Trustee of RONALD J. PARR, RONALD J. PARR,
Respondents.

**REPLY BRIEF IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

E. THOMAS BOYLE
Suffolk County Attorney
Counsel for Petitioner
Building 158
North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788
(516) 360-4049

Of Counsel:
DENNIS E. MILTON
Chief Deputy County Attorney

CAROLINE LEVY
Assistant County Attorney

January 10, 1990

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This brief is submitted in reply to
Respondent Lincoln Savings Bank FSB's brief
in opposition to petitioner's application for
certiorari.

ARGUMENT

POINT I

THE DECISION OF THE COURT BELOW IS FOUNDED EXCLUSIVELY UPON ITS INTERPRETATION OF THE BANKRUPTCY CODE, AND THEREFORE DOES NOT REST ON AN INDEPENDENT STATE GROUND.

Respondent argues that the decision below rests on an independent state ground. In making this argument, Respondent ignores the Circuit Court's analysis of federal law which is the foundation for the opinion below. The court below made reference to the provisions of New York State and Suffolk County real property law because of its interpretation of Bankruptcy Code Sections 362(a)(4), 362 (b)(3) and 546(b).

In narrowly interpreting the exception to the automatic stay which is carved out by 11 U.S.C. §§ 362(b)(3) and 546(b), the court below relied upon its finding that the "purpose of this exception is to 'protect, in spite of the

surprise intervention of [the] bankruptcy petition, those whom State law protects' by allowing them to perfect an interest they obtained before the bankruptcy proceedings began." (App. 24a) In defining the concept of an "interest" in property consistent with its interpretation of section 546(b), the Second Circuit expressly rejected the Fourth Circuit's view "that the county has an interest in the property that is 'ever-present' because of its inherent governmental authority and control over the land." (Second Circuit decision, App. 29a) Instead, it chose to examine state and local law solely for the purpose of determining when the County's interest under 11 U.S.C. § 546(b) arose.

Thus, while the lower court's interpretation of federal bankruptcy law makes reference to state real property law, there is no independent principle of state law upon which the Second Circuit's decision is founded. Indeed, since this is a proceeding in bankruptcy, and the issues in this case involve the proper administration of a bankrupt's estate, it is inherently a matter of federal law.

POINT II

THE LOWER COURT'S DECISION IS NOT CONSISTENT WITH THE INTENT OF CONGRESS AND THE GENERAL OBJECTIVE OF THE BANKRUPTCY CODE.

Respondent argues that municipal priority for post-petition real property taxes contravenes the intent of Congress in that: (1) "Section 546(b) was 'not designed too [sic] give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases..."; and (2) "Congress intended that all creditors, including local government, be treated fairly and equally...." (Respondent's brief at page 15)

However, it is the interpretation of section 546(b) given by the court below which undermines these very objectives. The tax lien laws were not enacted to provide municipalities with disguised priorities in bankruptcy proceedings. The law pertaining to real estate tax liens applies to all non-exempt property without reference to bankruptcy proceedings. The interpretation placed upon 11 U.S.C. § 546(b) by the

court below makes its application dependent upon the particular language of local law. This fosters diversity rather than uniformity and encourages state and local legislative action to ensure that the governmental unit will be entitled to a priority for its taxes in a bankruptcy proceeding.

Finally, the decision below does not achieve Congress' objective of fair and equal treatment of creditors because municipalities are placed at a distinct disadvantage in protracted bankruptcy proceedings. The Second Circuit found that section 546(b) was a "one-time exception for the creditor who gave value but has not yet perfected its lien..." (App 31a) That interpretation assumes that a creditor will discontinue giving its services to the bankrupt after the commencement of the bankruptcy proceeding. A municipality simply cannot discontinue the provision of police or fire protection or other municipal services to the bankrupt's property. Thus, the municipality is

placed in the position of a creditor who is forced to continue to give its services to the debtor after the commencement of a bankruptcy proceeding without receiving any protection, by means of a priority, in return.

POINT III

RESPONDENT'S ENDEAVOR TO MINIMIZE THE CONFLICT BETWEEN THE CIRCUIT COURTS IS UNPERSUASIVE.

A principal argument advanced by Respondent for circumvention of the clear conflict with *Maryland National Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983), is that the Fourth Circuit only permitted post-petition perfection of a claim for a single year's taxes. This argument is without merit. It makes no difference whether the court permitted the post-petition perfection of one year or six years of tax liens. If section 546(b) permits the post-petition perfection of real property tax liens based upon the municipality's ever present interest, the number of post-petition tax years is irrelevant.

Moreover, the Fourth Circuit's analogy to a hypothetical purchaser of real property on the date the bankruptcy petition is filed is entirely consistent with the position of the County. If there were such a hypothetical purchaser in this case, that purchaser would certainly have known that taxes accruing on the date of purchase, but not yet due and payable, would be the purchaser's responsibility. New York State Real Property Tax Law § 300 provides that "[a]ll real property within the state shall be subject to real property taxation...unless exempt therefrom by law," without any reference whatsoever to the owner having actual physical possession. Therefore, it would be unrealistic and contrary to law if that hypothetical purchaser did not expect to pay real property taxes for each year of ownership.

Finally, contrary to Respondent's assertion, the Fifth Circuit's decision in *Stanford v. Butler*, 826 F.2d 353 (5th Cir. 1987) adopts the reasoning of the Fourth Circuit with regard

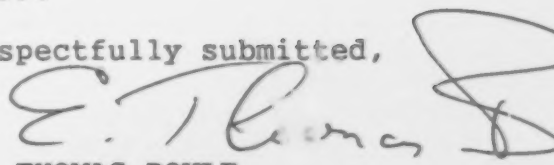
to the post-petition perfection of real property liens, and is in conflict with the Second Circuit's decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Hauppauge, New York
January 10, 1990

Respectfully submitted,



E. THOMAS BOYLE
Suffolk County Attorney
Building 158,
North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788
(516) 360-4049
Counsel for Petitioner

Of Counsel:
Dennis E. Milton
Chief Deputy County Attorney

Caroline Levy
Assistant County Attorney

